



City of Phoenix
OFFICE OF ENVIRONMENTAL PROGRAMS

November 8, 2019

Mr. Trevor Baggione
Water Quality Division Director
Arizona Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007

RE: City of Phoenix Section 404 Assumption Roadmap Comments

Dear Mr. Baggione:

The City of Phoenix (Phoenix) has reviewed the *Clean Water Act and State Section 404 Proposed Program Roadmap* (Roadmap) released in August 2019. We provided a response to the online Roadmap survey on September 25, 2019 and we reiterate our position from the survey that we don't believe Clean Water Act Section 404 (Section 404) assumption by the state would provide a benefit or value to the city when compared to the current U.S. Army Corps of Engineers (USACE) program. However, in response to the Arizona Department of Environmental Quality's (ADEQ) fourth survey question, we are also providing this letter to provide detail on proposed program gaps we've identified, in the event Section 404 assumption continues forward. The Roadmap provides a broad overview of the proposed program but lacks the detail necessary to fully understand the gaps and extent of impacts on regulated entities. We recommend the key gaps identified in the letter also be added to the Preliminary Rules Structure in Appendix A of the Roadmap, where appropriate. We appreciate ADEQ's continued outreach to stakeholders and the opportunity to provide comment.

General Comments

In the 404 Assumption Stakeholder Meeting (stakeholder meeting) on September 19, 2019 in Phoenix and at the business roundtable meetings, ADEQ staff stated that ADEQ is seeking the opinion of *applicants* to decide whether they should continue to assume the Section 404 program. All stakeholder input should be considered in deciding whether to move forward with 404 assumption, not just applicants. Section 404 is a program that affects environmental and water quality in the state, so even those who do not directly apply for Section 404 permits will be affected by the program and permit decisions.

It was clear in the stakeholder meeting that there are many outstanding questions and gaps that have not yet been considered by ADEQ. In several instances, ADEQ staff told stakeholders that the missing details would be provided in the draft rulemaking and were unknown at this time. If ADEQ moves forward with the Section 404 assumption, it appears there will significant new information in the draft rulemaking that has not yet been provided to stakeholders. ADEQ needs to build enough time in their overall schedule to provide sufficient time for public review and comment of the draft rules and for substantive changes to be made from those comments. Depending on the comments received, it may be necessary to provide a revised draft rulemaking for public review and comment rather than immediately proceeding to final rules.

As we have noted in previous public comments, Phoenix remains concerned that ADEQ has proceeded down the Section 404 assumption path without completing a robust economic feasibility study. Such a study would provide critical information about statewide economic considerations and the impacts of permit fees on compliance rates and potential economic opportunity costs across the range of applicants. This is essential information as ADEQ decides whether to continue pursuing Section 404 assumption. Waiting to complete or release this information until the notice of proposed rulemaking, as ADEQ staff indicated at the stakeholder meeting, is too late.

In addition, although the Roadmap (pg. 14) indicates that ADEQ assumes a change in definition of Waters of the U.S. (WOTUS) would not change the fees, the feasibility study should evaluate Section 404 assumption under both the existing WOTUS definition in Arizona and the latest proposed WOTUS rule. Such a dramatic shift would be presumed to have significant implications for the economics of Section 404 program assumption.

Endangered Species Act (Roadmap pages 29-31)

ADEQ's proposed informal consultation process with the U.S. Fish and Wildlife Service (USFWS) will not provide Endangered Species Act (ESA) liability coverage to permittees. Similarly, referenced coordination with the Arizona Game and Fish Department, while a valuable step, will also not provide the liability coverage that permittees may need. The only method to get incidental take permitting under an ADEQ program as proposed, would be either: 1) off-ramping the permit to the USACE; or 2) utilizing ESA Section 10 to enter into a non-federal agreement with USFWS.

With the first proposed solution, the applicant would have already paid a permit fee to ADEQ (presumably non-refundable, although ADEQ staff could not answer that question at the stakeholder meeting) and gone through some level of review at ADEQ to determine that potential impacts were such that it requires off-ramping to the USACE. The application process would then have to start from scratch with the USACE once ADEQ hands it over. In addition, the USACE needs information to assist with their NEPA process and public interest review requirements that ADEQ will not be gathering, resulting in additional delays as that is put together. The off-ramping solution will delay permitting beyond a process that starts and ends with the USACE. Additionally, in the ADEQ Executive Work Group, when the off-ramp solution was discussed, the Environmental Protection Agency (EPA) seemed uncertain as to whether such a method would constitute partial assumption and therefore could be an invalid method to address this issue. Therefore, this solution may not be approvable at EPA, nor is it clear in the Roadmap if the USACE has agreed to such an off-ramp solution.

With the second proposed solution, the applicant would undertake negotiation with the USFWS directly and enter into a separate agreement with them which would provide an incidental take permit under Section 10 of the ESA. This is a long process which would significantly delay projects. In a recent example, an existing USFWS-Phoenix Section 10 agreement took almost five years to amend. ADEQ staff did indicate at the stakeholder meeting that ADEQ may issue a Section 404 permit prior to, but contingent upon, receipt of Section 10 authorization. Phoenix agrees that under the 404(b)(1) guidelines, making the permit contingent upon USFWS consultation/permitting is appropriate. However, instead of creating a state program that will help applicants get through the ESA evaluation and permitting process in a reasonable timeframe, this idea of providing a contingent permit is only useful in helping ADEQ meet their proposed licensing timeframes. From a practical perspective, this does not reduce, but rather extends, the permitting timeframe overall for applicants when compared to the USACE program.

Based on the proposed program in the Roadmap, projects with the potential to adversely affect species protected under the ESA will be significantly delayed compared to what would be expected with the established and mandated process under the USACE program (e.g., ESA Section 7 consultation), which has specified timeframes associated with that consultation process.

These concerns remain, and are even strengthened, under the expectation of the proposed WOTUS rule, the final version of which is expected in early 2020. That rule is expected to retain only intermittent and perennial watercourses as WOTUS, which are precisely the waterbodies most likely to have threatened and endangered species considerations in Arizona. Many of the few remaining Section 404 permits needed would therefore be expected to be off-ramped to the USACE, making ADEQ an unnecessary and expensive middle step between the applicant and the ultimate permitting authority.

In addition, Phoenix reiterates that although “may affect” findings requiring formal Section 7 consultation were identified for only two percent of Section 404 permits in Arizona, this statistic may be misleading. It is important to recognize that the number of consultations required can expand quickly upon the listing of a new species or new USFWS guidance. ADEQ should not decide to assume the Section 404 program with a viewpoint that the level of endangered species involvement in Section 404 permitting is static, when it could change dramatically and suddenly. Losing the federal coordination offered through ESA Section 7 has major implications to future permittees from a time and cost perspective.

The Roadmap was not clear on how ADEQ would arrive at a finding of jeopardy or adverse modification of critical habitat and therefore, permit denial. Phoenix expects this would question would not arise frequently but ADEQ needs a plan on how to identify such potential impacts, without the benefit of having formal consultation with USFWS. Would this be identified during the information consultation process? Has ADEQ requested USFWS input on how this determination would be made? Phoenix strongly recommends that USFWS would need to be the final authority on the determination of jeopardy or adverse modification of critical habitat, but it is unclear how that interaction would work in a state program. Prior to submittal of a Section 404 permit package to EPA, this gap should be filled.

Fees (Roadmap pages 14-16)

Phoenix provided comments on the proposed fees in the Roadmap via ADEQ’s online Roadmap survey on September 25, 2019 (text attached separately to this letter). Since then, we have reviewed our files to estimate the cost of ADEQ’s proposed program fees on city projects. Given the level of detail that is still unknown, we estimated that ADEQ fees alone will cost the Phoenix anywhere between \$500,000 and \$1.6 million over the course of five years. If notification limits change, our consultant costs could also increase if more projects require notification to the regulatory agency than previously.

These proposed costs are a significant concern to us. Phoenix, like many government agencies, has limited funds with which to provide a wide variety of services and amenities to our residents and high permitting fees inhibit our ability to respond to and meet those needs. This is particularly true when we reflect that the USACE has been very successful in meeting our permitting and timeline needs without such fees. Meanwhile, there are significant questions about the realism of the timelines ADEQ is proposing in the Roadmap (as discussed further in this letter under **Licensing Timeframes**).

Please note that these concerns remain even if the new WOTUS rule is published as proposed. It is true that, under the proposed rule, the number of waterbodies considered WOTUS in Phoenix would decrease significantly and the number of Section 404 permits Phoenix would expect to need would also decrease. However, given the history of the WOTUS definition and the extreme shift the new rule represents, it is expected that a new federal Administration would quickly take up this question of WOTUS for yet another redefinition. Phoenix is not willing, and does not recommend others, to assume this WOTUS rule is the final version over the long term.

The Roadmap also does not address fees for situations such as permit extensions and renewals, modifications (major and minor), situations when there's a combination of general permit non-notifying and notifying impacts across multiple waterbodies, applicant/regulator meetings, public hearings, etc., or when a permit is off-ramped to USFWS. It is unclear if this is because no fees would be required for these situations or if they just haven't been considered yet.

Phoenix continues to be concerned about economic opportunity cost or increased non-compliance as a result of these high fees, particularly with respect to small businesses or individual landowners for whom such fees would be a significant burden.

Cultural and Historic Resources (Roadmap pages 32-34)

The cultural and historic resources section of the Roadmap has several instances of equivocal language that gives the impression of loose protection of these resources. For example, on page 32 of the Roadmap, it is written that ADEQ intends to be as protective of cultural and historic resources *as practicable* and permitted by state law. It is unclear what is meant by "as practicable". And on page 33 of the Roadmap, it states that ADEQ *may* consult with SHPO and potentially tribes, on how a project might be modified to avoid significant degradation. In the stakeholder meeting, ADEQ staff did not have specifics on how this process would work. The details of defining and working through a call of significant degradation from a cultural and historic resources perspective is a gap in the program that ADEQ needs to fill and provide to stakeholders for review and comment. In particular, we need more information on how ADEQ will make a decision on whether an action constitutes significant degradation of cultural resources. Who will be involved in making that determination? The Roadmap states that ADEQ *may* involve SHPO and the tribes. Phoenix recommends that, as SHPO and the tribes are the experts in this field, ADEQ should be required to get their input if a project is approaching the potential for significant degradation. That threshold for this consultation should be determined with input from SHPO and the tribes.

Another example of this equivocal language is on page 34 of the Roadmap, where it's written, "where appropriate under its authority, ADEQ intends to uphold the tribal consultation responsibility in its permitting process." ADEQ's Section 404 authority and program should give them the authority to consult with the tribes for any permit action where it's needed. If it does not currently, that should be adjusted prior to assuming the Section 404 program. Phoenix is concerned about the use of the language "where appropriate under its authority," – under what circumstances would such consultation not be appropriate under ADEQ's authority?

The Roadmap also does not specify if local authorities will be included in cultural consultation for projects in their jurisdiction. For example, Phoenix has both a City Archaeologist and a City Historic Preservation Officer. We would like to be included as part of cultural consultation for projects within our

jurisdiction as experts with interest in the project area and because we could have valuable data that could help with ADEQ's permitting action.

Under Tribal Consultation on page 34, it states that ADEQ may ask permittees to consider tribal and SHPO input and modify proposed activities to reduce adverse effects on cultural resources. This illustrates the gap in ARS § 41-861 through 866 and ARS § 41-2051, which require consultation with SHPO and affected tribes but do not require a resolution of adverse effects or legally binding agreements associated with those resolutions and effects. Phoenix refers ADEQ to our May 22, 2019 comment letter which recommends the development of a process to require an effect finding of permitted activities on historic/archaeological resources, and a method to mitigate that effect (when needed), and the appropriate legal instrumentation to require that mitigation.

Phoenix also recommends identification of timeframes associated with consultations with SHPO and tribes, so project proponents can appropriately factor such consultation in their project and permitting timeframes.

Tribal Consultation (Roadmap page 35)

In the April 25, 2019 EWG meeting, ADEQ staff mentioned that it is working on reaching out to various tribal governments in Arizona but had only been able to have conversations with six of the 22 so far. The August 2019 Roadmap expanded that to eight of the 22 tribes. Phoenix emphasizes the importance of tribal government input as ADEQ considers assuming the Section 404 program, not only from a cultural and historic resource perspective, but also as important governing entities with interests in Arizona beyond their formal borders. 40 CFR § 233.31 requires that if a proposed discharge may affect WOTUS in another state, the permitting state must provide an opportunity for the affected state to provide comments and suggest permit conditions. In Michigan, these other states have been defined to include the tribal governments in Michigan. The question of treating tribes as other states and what that means to them will require more than conversations with just eight tribes. In addition, formal consultation is needed as the program is being developed and during EPA review. EPA has a tribal trust responsibility and a 404 assumption program should not be approved unless that responsibility has been appropriately fulfilled.

Compensatory Mitigation (Roadmap pages 35-38)

Compensatory mitigation is a complex and important element of the Section 404 program, but it is also the last step in the philosophical and regulatory approach (discussed in the 404(b)(1) guidelines) to mitigating impacts to WOTUS: avoid, minimize, compensate. Phoenix emphasizes that any state program must first and foremost work with permittees to *avoid* impacts in WOTUS to the extent practicable. ADEQ must then work with the permittee to *minimize* remaining impacts in WOTUS. Only after both avoidance and minimization have been maximized, should compensatory mitigation for unavoidable adverse impacts be addressed.

The Roadmap expresses the intent to set a timeframe for what "in perpetuity" means for mitigation actions. ADEQ staff further expressed at the stakeholder meeting that this would probably be an effort undertaken after the assumption is complete but noted it could be included in the draft 2020 rulemaking. Regardless of whether this definition effort occurs during draft rulemaking or after assumption (should that occur), a public process of review and comment is appropriate. In addition, ADEQ should work closely with EPA to make sure the definition is appropriate for the long-term nature of compensatory mitigation as described in 40 CFR 230.

Page 27 of the Roadmap specifies that one of the essential tasks that would be performed by the program would be the oversight of new in-lieu fee funds, mitigation banks, and permittee responsible mitigation. Clarification on whether the USACE will retain oversight of existing in-lieu fee funds and projects would be helpful. Clarification on ADEQ's vision for the role of the interagency review team in an ADEQ Section 404 compensatory mitigation program would also be helpful to better provide comments and identify any potential ongoing gaps.

Jurisdictional Determinations (Roadmap pages 28-29)

Page 28 of the Roadmap states that JDs may be issued for longer than five years, if negotiated with EPA. More detail on what ADEQ proposes is needed here in order to be able to provide comment on this idea. For example, would this be for JDs with negative findings (i.e., no WOTUS present), positive findings, or both? How much longer than five years would ADEQ seek to issue JDs and what is the thought process behind why this would be appropriate? Would this include wetland delineations? Would JDs retain the caveat, "or until a significant flow event" to account for changes due to large storms or floods?

Page 29 of the Roadmap discusses providing an online map of all JDs to enhance transparency. Phoenix reiterates our concerns to provide completed JDs on an online map with open access. This would have a significant potential for misinterpretation and inaccuracy. Currently, JDs expire after five years or a significant flow event so it would be critical for ADEQ to keep up with what is happening at individual WOTUS (including, under the current definition, many ephemeral washes) across the entire State and update the map regularly. This is an almost impossible undertaking that would require significant resources – which would presumably be passed on to permittees in the form of even higher fees.

There is also a serious risk that such a map would be misinterpreted to assume that the limits of the Water identified online are still accurate even though conditions may have changed. Or the map could be misinterpreted to assume that a wash is not a WOTUS just because it is not shown on the map, when it may simply have not been yet delineated. Because WOTUS cross land ownership boundaries, there may also be some privacy concerns with such a map

Although not addressed in the Roadmap, if ADEQ assumes the Section 404 program, existing JDs (both PJDs and AJDs) should be automatically assumed by ADEQ, with the option for the applicant to request a re-evaluation if desired. If ADEQ does not automatically accept all existing JDs, then applicants would need to individually request their JD transfer over to ADEQ, which would be more bulky and time-consuming than the alternative. Extensive outreach efforts would also be needed to inform people they need to specifically request their JD be transitioned. It would be more efficient to accept all JDs initially, then work upon request to complete any requested re-evaluations.

Permit Process (Roadmap pages 41-47)

More clarity is needed and requested on the circumstances under which ADEQ would not issue a Section 404 permit. In the stakeholder meeting, ADEQ staff responded to this question by stating that any action that violated a surface water quality standard, resulted in jeopardy of a threatened or endangered species, or caused significant degradation would not be provided a Section 404 permit. This response was greatly appreciated but this should be clear in the Roadmap and in future discussions regarding permit process. In particular, more clarity is needed from ADEQ on what "significant degradation" means from the perspective of an ADEQ Section 404 program. This is a topic that had a robust level of

discussion in the Alternatives Analysis/Significant Degradation workgroup, which made it clear there is a range of potential meanings/implications. Section 404 assumption should not proceed without a clear understanding provided to stakeholders of that definition in an ADEQ program and how it will be applied to Section 404 permitting decisions.

Additional detail is also requested with the general permit notification limits and general permits to be offered. It was unclear in the Roadmap if ADEQ is intending to whole-sale adopt the USACE nationwide permit program or if ADEQ will develop their own general permit program. Additional clarity is also requested on the emergency permits mentioned in the Roadmap. It sounds like there will be both general and individual emergency permit options. Details are needed on how an individual emergency permit would work and interact with the 404(b)(1) alternatives analysis, consultation, and public notice requirements of individual permits.

On page 14 of the Roadmap, Figure E provides a list of nationwide permits for which the state would not require a fee to obtain coverage (presumably because they will be solely non-notifying). ADEQ should carefully review these permits to identify their requirements. At least one (NWP 20), requires activities be done under certain auspices, one of which is under the oversight of a federal on-scene coordinator. There may be other unique situations in other nationwide permits that ADEQ should investigate to identify whether it can be made a state permit or how required interactions would work. Please also note that nationwide permit general conditions require certain consultations with USFWS, SHPO, etc. if protected resources are present. As discussed in the ESA and cultural resources section, ADEQ has not proposed equivalent processes in the Roadmap to evaluate impacts on those resources and provide the applicant with liability protection.

Under 40 CFR 233.51, the EPA may waive review of certain types of Section 404 permits, which is to be identified in the MOA between ADEQ and EPA. The Roadmap did not detail which permits ADEQ proposes EPA should waive review. This is an important topic that should be provided for public review and comment prior to finalizing an EPA MOA. Insufficient detail was provided in the Roadmap to be able to discuss this gap.

Letters of Permission (LOP) were briefly addressed in the Roadmap, but if ADEQ intends to provide LOPs, significantly more detail is needed. In particular, the true benefit of an LOP is the ability to have a longer timeframe for this type of “umbrella” approval under which projects can individually be authorized. It is unclear in the Roadmap if ADEQ would be allowed or able to issue LOPs for longer than 5 years or if this permit is also restricted to the 5-year limit. ADEQ’s vision on how LOPs would be used within the permitting program would be helpful to be able to provide more robust comments on the potential benefits and gaps of including this in an ADEQ Section 404 program. A state’s limit of a 5-year permit term is, to Phoenix, one of the less preferred aspects of an ADEQ assumption, since we have several individual permits with the USACE for recurring habitat restoration activities that are for a 10-year period.

Licensing Timeframes

Also in the stakeholder meeting, in response to a question about how a 30-day timeframe would be met for permit decisions requiring consultation with USFWS, SHPO, or tribes, ADEQ staff responded that this timeframe assumes no consultation is necessary and that timeframes held to legally will account for this consultation. Phoenix agrees that the timeframes proposed should include those consultations reasonably presumed to occur on a regular basis. However, this also means that the timeframes shown in the Roadmap do not represent these realistic circumstances or what will be included in the draft

rulemaking, but instead are geared toward showing the shortest possible timeframe that don't accurately reflect anticipated circumstances. It would be far more useful for the Roadmap to provide realistic timeframes for permitting decisions so stakeholders can provide fully informed comments.

ADEQ also mentioned the possibility of "stopping the clock" when actions by outside agencies are required so that ADEQ does not exceed their permitting timeframes. Phoenix disagrees with this perspective, which seems to only benefit ADEQ's tracking metrics while providing no benefit to the applicant. The applicant must still wait until all of those outside agency actions are completed in order to get the Section 404 permit. ADEQ may technically still meet their 120-day permitting timeframe, but the applicant may have been waiting for much longer to get their 404 permit. Phoenix recommends ADEQ provide timeframes which fully incorporate expectations for the length of time needed for outside agency consultations/actions so the applicant has a realistic idea of how long after submitting application materials it will take to receive a Section 404 permit.

Phoenix appreciates the opportunities for Phoenix staff to be involved in ADEQ's Section 404 assumption process and for the ongoing opportunities to review and comment as ADEQ moves through these steps.

Sincerely,



Nancy Allen
Environmental Programs Administrator

c: Tomás Torres, EPA Region 9 Water Division Director
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